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### The Many Texts of the Law

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# THE MANY TEXTS OF THE LAW

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## ABSTRACT

*This paper contends that even as jurists invoke the official canonic version of the legal text, it is in danger of being replaced for the jurist, as well as for the lay person, if it has not been substituted already, by some apocryphal, inauthentic or casual text. We argue that in addition to the approximate nature of legal knowledge, the overuse of overedited and perverted casebooks, as well as the distribution of legal information among imperfect sources – some official but partial, others inauthentic but highly accessible, and a few reliable but highly unaffordable commercial sources – are largely responsible for this situation.*

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Perhaps one of the most well-known passages from H.L.A. Hart's landmark work on jurisprudence, *THE CONCEPT OF LAW*, is his example of a rule at the entrance to a park: *No vehicles in the park*.<sup>1</sup> He then explores the ambiguity of that rule: *does it forbid roller skates, bicycles, toy automobiles, airplanes*, and the consequence of that ambiguity for law and its meaning. Hart ends by insisting that for most rules, which are expressed in language that is inherently ambiguous, there is a core of unambiguous meaning surrounded by a penumbra of ambiguity. He goes further to say that when judges and lawyers address the penumbra they do so by reference to social and cultural values.

For us, there is a far more important question. First, Hart's example examines law from the perspective of the jurist, not that of the lay person. But even as a jurist, he does not pay attention to how jurists are taught the law vis-à-vis the text of the law, and whether that has any potential implications in the way they understand and apply the law, and on how judges' work is understood by the lay person.

Here we continue where Hart stopped. We investigate what it means for the legal professional to learn the law by reading excerpts of cases spoon-fed to make learning easier. We wonder whether such an artifice which pretends to bring the student to the original source encourages an already budding instinct for the apocryphal, rather than the original source. We understand, of course, that the evolution of the casebook has followed the evolution of law, and the notion that law encompasses more than appellate cases. But we believe it was never contemplated that students and future judges would learn less about law (including appellate cases in their original form), rather than more, by editing cases and adding other materials.

Second, we analyze the current cultural climate and how it affects the common person's understanding of the law, even though Hart completely shies away from that study. In fact, for Hart, and those who came before, like Austin, Wittgenstein, and even Holmes, and after, like Fuller, the test of a legal system was always jurist-oriented. Jurisprudes seem to have missed entirely how the very focus of the legal system, the common person, might become less confident of her legal system as ambiguity, or the recognition and acceptance of ambiguity, rises. And, in turn, it is our view, or fear, that the legal system must become both less reliable and less integral, as the common person loses faith, or worse, in an ambiguous legal system.

What we have noticed, in our current media-centric and polarized society, is that the way law, in Hart's sense, is delivered to the public creates increasing ambiguity such that any public-centric measure of law loses almost all its sense and content. If law, to be law, must be known or knowable, to the public, law today is "known" in a plethora of ways, many of them mutually inconsistent. And we wonder whether that qualifies as law at all, if law has no core identity itself.

In many ways, one of the points of this article is that we have moved far away

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<sup>1</sup> H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-15 (1958). The example is reprised in modified form in H.L.A. HART, *THE CONCEPT OF LAW* 125-27 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994).

from the common man's sense of legal certainty<sup>2</sup> that Jeremy Bentham favored when he demanded that law be clear and concise enough to be posted at the entrance to every railway station.<sup>3</sup> It is that same sense of certainty that French codification sought by reducing inconsistent, haphazard, judicial decisions to a short and concise legal code. And, finally, it is that same sense that New York's Justice Field sought when attempting an American codification.<sup>4</sup>

This paper contends that even as jurists invoke the official canonic version of the legal text, it is in danger of being replaced for the jurist, and for the lay person, if it has not been substituted already, by some apocryphal, inauthentic or casual text. We argue that in addition to the approximate nature of legal knowledge, the overuse of overedited and perverted casebooks, as well as the distribution of legal information among imperfect sources – some official but partial, others inauthentic but highly accessible, and a few reliable but highly unaffordable commercial sources – are largely responsible for this situation.

## I. THE IMPERFECT NATURE OF LEGAL KNOWLEDGE ENCOURAGES AMBIGUITY ABOUT THE RULE OF LAW

From an abstract point of view, law represents the product of “many different wills and imaginations, interests and visions.”<sup>5</sup> At this basic level, society is perceived as the association of humans whose assumed eternal hostility to one another requires that order and freedom be maintained by government with the help of a specific linguistic tool called law. Governments use laws, man-made rules, because such institutional behavior satisfies a specific social and political desire or value, that of a society governed by legal language, by law. This postulate does not represent a universal or even an a-historic value. It has always been connected to the liberal state as we know it since the Glorious Revolution of 1688,<sup>6</sup> which established the victory of the English Parliament over the King, or the victory of “impersonal rules” over the King’s whimsical desires, expressed as subjective language, i.e., “because I say so”. In other words, our liberal society is intrinsically connected to prescriptive and normative rules, which bear on everybody’s conduct by stating what their subjects “may do, ought to do, or ought not to do.”<sup>7</sup> On a different plane, but reflecting what might be assumed to be a natural human instinct, both the Decalogue and Hammurabi's Code predate the Glorious Revolution by several millennia.

Roberto M. Unger’s definition of the role of the laws in our society appears

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<sup>2</sup> “[Either] I greatly overrate or [Bentham] greatly underrates the task not only [of digesting] our Statutes into a concise and clear system, but [of reducing] our unwritten to a text law.” (Madison’s answer to Bentham’s offer to codify the American law and make it clear for all judges to apply) William D. Bader, *Meditations on the Original: James Madison, Framers with Common Law Intentions - Ramifications in the Contemporary Supreme Court*, 20 VT. L. REV. 5, 7 (1995).

<sup>3</sup> JOHN DINWIDDY, BENTHAM (1989).

<sup>4</sup> See generally, CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW (1969).

<sup>5</sup> ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME 65 (1996).

<sup>6</sup> For more on the Glorious Revolution, see, e.g., Larry Kramer. *Putting the Politics Back* 100 COLUM. L. REV. 215 (2000).

<sup>7</sup> ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 69 (1975).

both poetic and idealistic but also deeply ambiguous:

[Laws] place limits on the pursuit of private ends, thereby ensuring that natural egoism will not turn into a free-for-all in which everyone and everything is endangered. They also facilitate mutual collaboration. The two tasks are connected because a peaceful social order in which we know what to expect from others is a condition for the accomplishment of any of our goals. More specifically, it is the job of the laws to guarantee the supreme good of social life, order and freedom.<sup>8</sup>

Whether idealistic or not, Unger seems correct in his perception of what the subjects of the law expect from it: to provide order. Thus, rather than ask Hart's open-ended question, "What is law?"<sup>9</sup> this paper asks "What makes a text law?" For Hart, law was the same phenomenon that Hans Kelsen had articulated earlier – rules emanating from places of authority.<sup>10</sup> Hart developed this positivist approach. He expanded the meaning of law beyond that of knowledge whose source was statutes, cases, international law, customs, etc., to emphasize that legal concepts embraced social theory and philosophic inquiry, too.<sup>11</sup> Hart halted his inquiry there, though. He did not negate the existence of imperfect legal knowledge, or legal "rumor" or "garble,"<sup>12</sup> as Leslie Green describes the general, although perhaps mistaken, understanding of Hart's work.

Hart mentioned that for the ordinary person law is something vague. He found evidence of approximate legal knowledge when he explained its limits.

Few Englishmen are unaware that there is a law forbidding murder, or requiring the payment of income tax, or specifying what must be done to make a valid will. *Virtually everyone* except the child or foreigner coming across the English word 'law' for the first time could easily multiply such examples, and most people could do more. They *could describe, at least in outline*, how to find out whether something is the law in England; they know that there are experts to consult and courts with a final authoritative voice on all such questions.<sup>13</sup>

Notwithstanding its approximate nature, Hart explained, legal knowledge is sufficient to ensure law's preeminent normative role. Hart did not ponder the textualization of legal rules. Perhaps based on his continental experience where legal information has a different distribution than in the United States, he assumed that the public would access and interact with the official text of the law or, more likely, consult an expert. That interaction ensured his fellow citizens' ability to explain or to "cite" and describe "at least in outline" the law. This limited legal knowledge nevertheless enabled the normative function of law to continue unobstructed, and the desired social order to voluntarily and democratically be maintained. The unbroken flow of the legal outline from the legislature to the judge to the lay person assured a common understanding of law, an understanding so undebated, that Hart did not think to address the possibility of its absence.

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<sup>8</sup> *Id.*

<sup>9</sup> See H.L.A. HART, *THE CONCEPT OF LAW* (3d ed., 2012).

<sup>10</sup> See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (1961).

<sup>11</sup> Leslie Green, *Introduction in* H.L.A. HART, *THE CONCEPT OF LAW* xv (3d ed., 2012).

<sup>12</sup> *Id.*

<sup>13</sup> See HART, *supra* note 9, at 2 (emphasis added).

Despite Hart's focus on the fact that "general [legal] rules, standards, and principles" which represented "the main instrument of social control"<sup>14</sup> and not on the gap between their enactment, publication, and application, his precise observations about legal knowledge and its normative implications facilitated subsequent analysis into the moment of law's actuation and the cognitive and practical gap it creates. This essay continues Hart's analysis and deepens his inquiry into our interaction with the sources of law, which is what Hart calls the "deliberate, datable acts,"<sup>15</sup> whether it comes from a legislative, judiciary or executive body. It points out that Hart seemed to have assumed legal knowledge was generated by a subject's (almost invariably a judge's) interaction with the official text of the law, which could incorporate social observations or even philosophical inquiry. However, this essay goes further and contests Hart's assumption about the totality of ways we interact with the law. Usually, as seen here, because of the nature of legal information and the way it is disseminated, law is realized through an interaction with something other than the "official" or the canonic legal text and it incorporates pre-existing cultural knowledge or "legal gossip." From this perspective, Hart's penumbra is not a mere technicality, but is as central to law as its core text. This becomes more important, as we argue below, in that the penumbra has recently expanded beyond all imagined limits, and threatens to continue to do so, at the same rapid rate, and perhaps even more rapidly, for the foreseeable future.

Far from a heresy, this argument resonates with Dworkin's work, which has described law as "an interpretive concept like courtesy."<sup>16</sup> While it is hard to gauge a person's legal knowledge, there are tools to investigate the nature of legal knowledge. For instance, Dworkin described the work of the members of the judiciary as interpretive theories which "are grounded" in their

convictions about the 'point' – the justifying purpose or goal or principle – of legal practice as a whole, and these convictions will inevitably be different, at least in detail, from those of other judges. Nevertheless a variety of forces tempers these differences and conspires toward convergence.<sup>17</sup>

If legal knowledge were to be as perfect as mathematical knowledge, for instance, there would be no need to work on tempering difference and ensuring convergence – the method of inquiry would discard mathematical deviation. To the contrary, as Dworkin explained, legal knowledge uses specific tools to produce its ultimate normative goals: (1) the doctrine of "stare decisis" and the judge's presumed role to follow legal precedent; (2) the "inevitable conservatism of formal legal education"<sup>18</sup> and (3) the conservatism of the process of selecting lawyers for judicial and administrative office.<sup>19</sup> Dworkin did not opine about another tool which is inherent to all human constructs, including law, and legal knowledge: cultural convergence. To the extent that there are cultural values which distinguish American culture among other cultures, culture acts as a corrective which tempers

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<sup>14</sup> *Id.* at 124.

<sup>15</sup> *Id.* at 44.

<sup>16</sup> RONALD DWORKIN, *LAW'S EMPIRE* 87 (1986).

<sup>17</sup> *Id.* at 87-88.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

legal differences and, for instance in the form of moral norms, becomes incorporated in our theory of a legal system and the mandates which establish it.<sup>20</sup> On the other hand, international legal convergence, a popular subject in international law assures some tempering of legal differences on the international level.<sup>21</sup>

While none of the scholars briefly discussed above qualified their understanding of legal knowledge as “imperfect,” they did so incidentally, by relying on non-legal texts to find the meaning of law. The question remains though whether our legal knowledge, our understanding of our legal system, has to be imperfect, and whether deciphering the meaning of law requires incorporating our cultural values and general knowledge. Does it have to start, at least for the lay person, with our approximate readings of apocryphal unofficial legal texts? Because if it does, it would more surely end with that type of source too. Is there something in the nature of legal knowledge that makes it easier for the public to access and use cultural legal manifestations rather than the canonic text of the law? The next paragraphs suggest that both the rigid hierarchy of official or canonical legal knowledge mirrored by obtusely written texts shape the approximate nature of legal knowledge.

Unger described legal knowledge as highly structural and used the concepts of theory and practice or social practice to illustrate this.<sup>22</sup> But, if we are to believe that “individuals and individual interests are the primary elements of social life, and because they are locked in a perpetual struggle with one another, [and] social order [is] established by acts of will and protected against the ravages of self-interest,”<sup>23</sup> then it makes more sense to describe legal knowledge using the concepts of theory and prudence, defined by Unger as “the knowledge of particulars or reasoning about particular choices.”<sup>24</sup> We would amend Unger’s definition to say that prudence in its dialectical connection with legal theory is political reasoning applied to specific historical moments to reach social order. What differentiates legal knowledge from other knowledge systems is its object. For instance, legal theory and prudence incorporate the most distinctive and general political values of a governmental entity and translate them into legal norms or text. Those values are further practically applied to historical moments as statutes and case law.

From its inception, the United States has always been the result of a dual political commitment to a democratic republic and to a market system intrinsically

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<sup>20</sup> See, e.g., JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM. AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM* (2d ed. 2003). For additional reading, see JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999).

<sup>21</sup> See articles on convergence, in such areas as TRIPS, especially IP. E.g., J. Janewa Osei-tutu, *Value Divergence in Global Intellectual Property Law*, 87 IND. L.J. 1639, 1647 (2012) (the article explains how value divergence is consistent with the TRIPS Agreement and how it can gradually lead to the convergence of intellectual property interests) CARLOS M. CORREA, *INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS* 3-4 (2000). Thomas K. Cheng, *Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law*, 12 CHI. J. INT’L L. 433, 490 (2012) (This Article examines the recent phenomenon of the convergence of competition law regimes across the globe).

<sup>22</sup> ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 9 (1986).

<sup>23</sup> UNGER, *supra* note 7, at 75.

<sup>24</sup> *Id.* at 254.



connected to it, as if one could not have existed without the other. This social and political structure relied on a “legally defined institutional structure that went along with it.”<sup>25</sup> As Unger pointed out, there is a clear agreement between the political commitment and the legal theory explaining, exposing, and making it happen. Like all legal systems, ours too incorporates the general principles associated with the embraced political commitment. Within the umbrella of its own “rule of law” then, it puts them to work. Incorporating Unger’s explanation, our legal knowledge mirrors the United States legal system which can be described as the marriage between a specific type of legal theory, our expanded view of Unger’s prudence<sup>26</sup> and their practical application through specific statutes, cases, rules, and regulations.

Legal theory contains the most abstract rendition of our political commitment, under the name of “the rule of law,” while prudence represents the linguistic application of that theoretical ideal to a set of historical particular circumstances or “reasoning about particular choices.”<sup>27</sup> Unger’s hierarchy is unclear – whether a duopoly or triumvirate. However, it makes sense to add another clear element to his theory and prudence and distinguish prudence from practice. Thus, legal knowledge is dominated by a triumvirate – theory, prudence, practice – as they are necessary to govern our market-based social hierarchy, always described as our liberal society.

While theory, our rule of law, favors normative rules, its practical application to particular circumstances favors its descriptive side, because most commands need explanatory details in order to be obeyed. The rule of law continually adapts itself to a new historical epoch through prudence and its various applications and incorporating various degrees of normativity by means of detail and specificity. Interestingly, the rule of law and its bare linguistic rendition constitute the back bone of everybody’s general legal education and cultural legal background. At the opposite end of the spectrum, its detailed statutory or case law application remains only vaguely known and approximated by the majority of the public, and of course, is only formally taught in law schools;<sup>28</sup> occasionally, and surprisingly, it is misunderstood by judges themselves.<sup>29</sup>

## II. JURISTS’ COMPLACENCE ABOUT LAW’S AMBIGUITY

If legal knowledge is inherently imperfect because of its highly hierarchical structure which encourages retention of the main constitutional principles (the rule

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<sup>25</sup> UNGER, *supra* note 22, at 5.

<sup>26</sup> See *id.* and text accompanying notes 5 to 7 *supra*.

<sup>27</sup> UNGER, *supra* note 7, at 254.

<sup>28</sup> See generally, DUNCAN KENNEDY, *LEGAL REASONING: COLLECTED ESSAYS* (2008).

<sup>29</sup> See e.g. Alan C. Weinstein, *The Ohio Supreme Court's Perverse Stance on Development Impact Fees and What to Do About It*, 60 CLEV. ST. L. REV. 655, 679 (2012) (describing the decision of the Ohio Supreme Court in *Drees Co. v. Hamilton Twp.*, 970 N.E.2d 916 (Ohio 2012) as “deeply distressing” : “the court failed even to acknowledge, let alone distinguish: (1) its own ruling upholding impact fees twelve years before in *Homebuilders Association of Dayton* and the *Miami Valley v. City of Beavercreek*, and (2) the state supreme court decisions that had rejected the reasoning of the Iowa and Mississippi courts upon which the Court relied in part” *Id.* (internal citations omitted).



of law translating our market-driven democracy) and approximation of the descriptive applications of our rule of law, we should examine whether its linguistic nature also plays a role in amplifying that problem.

Legal knowledge starts with the reading of the language of a legal text, whether canonic or, more often, some cultural approximation. Referring to legal theory and knowledge as language may be infuriating to some, but as Rousseau diplomatically put it – “When Archimedes ran naked through the streets of Syracuse to announce his findings, what he said was no less true because of the way it was communicated.”<sup>30</sup> Law is legal knowledge which translates social, economic and political values into language which follows linguistic rules and which is further textualized in the process of reading or actuating it. This paper postulates that legal language, especially detailed, meticulous legal knowledge, generates an inherently approximate understanding.

Language shapes knowledge but because language is molded in various degrees by the cultural values of a society, and culture molds specialized knowledge, American language is molded by American culture, and to the extent language seduces us into specific patterns of thinking, American culture and its values seduce our thinking.<sup>31</sup>

Our language has remained the same and keeps seducing us into asking the same questions. As long as there continues to be a verb ‘to be’ that looks as if it functions in the same way as ‘to eat’ and ‘to drink,’ as long as we still have the adjectives ‘identical,’ ‘true,’ ‘false,’ ‘possible,’ as long as we continue to talk of a river of time, of an expanse of space, etc. etc., people will keep stumbling over the same puzzling difficulties and find themselves staring at something which no explanation seems capable of clearing up. And what’s more, this satisfies a longing for the transcendent, because in so far as people think they can see the ‘limits of human understanding,’ they believe of course that they can see beyond these.<sup>32</sup>

Of course, not all language is molded equally by cultural values, and various cultural values mold various types of language differently. For instance, law does not use the language of the ghetto or of some marginal subcultures. Law uses mainstream language, and its lack of flexibility impacts legal knowledge. This linguistic ossification translates into an ossification of imagination, or in law, it forces us to stay on one informational path and to try to solve the same problems in the manner generations before us saw and tried to solve them.

For instance, if within the last few decades, using *stare decisis* rather than statutory language -42 U.S.C. 1973- has been the way to solve Section 5 Voting Rights Act litigation, it seems reasonable to assume that this mode will be continued for a reasonable time into the future by the United States Supreme Court. This observation further translates into compounding approximate knowledge. To further exemplify this point, on the U.S. Department of Justice’s web site, if you search for Section 5 Voting Rights Act, your first hit is an editorializing paragraph of the latest U.S. Supreme Court decision:

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<sup>30</sup> UNGER, *supra* note 7, at 192. For the original quote, see Jean Jacques Rousseau, *Lettres Ecrites de la Montagne*, 3 OEUVRES COMPLETES 686 (B. Gagnebin & M. Raymond eds., 1964).

<sup>31</sup> See LUDWIG WITTGENSTEIN, *CULTURE AND VALUE* 15e (Peter Winch trans., 1980).

<sup>32</sup> *Id.*

On June 25, 2013, the United States Supreme Court held that it is unconstitutional to use the coverage formula in Section 4(b) of the Voting Rights Act to determine which jurisdictions are subject to the preclearance requirement of Section 5 of the Voting Rights Act, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).<sup>33</sup>

The link to the statutory language appears further below in the page, almost as if an afterthought.<sup>34</sup>

Linguistic ossification and ossified imagination have a potentially positive effect; by remaining the same over a longer period of time, language could and sometimes does foster common understanding. In law, especially, this result is highly desirable. It can be said that the only period of societal calm that persists for long is when interested parties and the population at large see in legal language the same thing, or understand it as saying the same thing. Put another way, the more flawless the communication between our social, economic and political values and their legal articulation, the easier it is to preserve social order.

However, as seen here, it is easier to maintain a flawless communication between the textual rendition of our rule of law – the Constitution -- and our social and political commitment than between the various statutory applications of our rule of law, and our interpretation of those legal texts. Again, that may be because the Constitutional text is rather vague, has a religious flavor,<sup>35</sup> and encourages a religious type of understanding. If religious understanding requires one to go beyond the letter of the text, the same result surely occurs when faced with the much more detailed statutes which abound in arid, hard to grasp, descriptive language. It seems that no matter the degree of legal detail, nothing is obvious when it comes to law (*No vehicles in the park*). Nothing seems to be comprehensively described within statutory language, for instance. Or, as Wittgenstein noted, maybe all “assertions about reality, assertions which have different degrees of assurance”<sup>36</sup> may appear obvious, and easy to grasp, but somehow, the most obvious assertions “may become the hardest of all to understand.”<sup>37</sup>

While slow to change, as Wittgenstein observed, language is nevertheless open to interpretation. Common law language is even more so open. As Hart noticed, law in the form of legal language incorporates cultural influences, whether social observations or philosophical inquiries. To the extent that pre-existing cultural interpretations mold our legal understanding, we can talk about a cultural corrective of the multitude of possible legal readings. Think about how a statute needs to be read together with its judicial applications, which then needs to be divided into its binding and not-binding part (the law student's classical distinction between holding and dicta), which in fact will be applied more or less as a matter of faith until something happens and a contradiction between the legal language assumed as binding and a specific situation will need to be resolved anew. That

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<sup>33</sup> *Section 5 of the Voting Rights Act*, JUSTICE.GOV, [http://www.justice.gov/crt/about/vot/sec\\_5/about.php](http://www.justice.gov/crt/about/vot/sec_5/about.php) (last visited Apr. 12, 2014).

<sup>34</sup> *Subchapter I-A: Enforcement of Voting Rights*, JUSTICE.GOV, [http://www.justice.gov/crt/about/vot/42usc/subch\\_ia2.php#anchor\\_1973c](http://www.justice.gov/crt/about/vot/42usc/subch_ia2.php#anchor_1973c) (last visited Apr. 12, 2014).

<sup>35</sup> See, generally, Duncan Kennedy, *American Constitutionalism as Civil Religion: Notes of an Atheist*, 19 NOVA L. REV., 909 (1995).

<sup>36</sup> LUDWIG WITTGENSTEIN, ON CERTAINTY 66 (Denis Paul & G.E.M Anscombe trans., G.E.M Anscombe & G.H von Wright eds., 1969).

<sup>37</sup> WITTGENSTEIN, *supra* note 31, at 17e.

will involve the specific language at issue quoted and questioned and the cycle will continue!

All these brief linguistic observations suggest that language affects our understanding and legal language affects our legal knowledge. That linguistic phenomenon seems to have only one desired effect, that of preserving the approximate nature of legal knowledge.

Concluding the findings of this first part of the paper, we saw that legal philosophers such as Hart noticed our imperfect legal knowledge. Additionally, the structure of our legal system promotes perhaps so many legal applications of our rule of law that it becomes impossible to know much of them other than by their main ideas and title, much like we refer to *Section 5 Voting Rights Act litigation*, but we do not really know what those cases contain.<sup>38</sup> Continuously detailing normative texts forces the reader to use interpretive cultural tools to decipher it. This further preserves the imperfect and approximate nature of legal knowledge. Furthermore, legal language is not something which people recite aloud with their eyes closed while holding hands, or whose words people sing and dance to, or post on their FACEBOOK account for further social engagement, or even ponder about their meaning. Even the most renowned jurists of the land approximate legal language from its very inception and then its application is further inexactly publicized.

### III. RANDOM EXAMPLES ABOUT LAW'S AMBIGUITY FOR JURISTS AND CITIZENRY

As explained above, our rule of law, legal theory, favors normative rules. Its practical application to particular circumstances favors its positivist or descriptive side. If the rule of law and its bare linguistic rendition constitute the back bone of everybody's general legal education and cultural legal background, at the opposite spectrum, its detailed statutory or case law application remains only vaguely known and approximated by the majority of the public. Furthermore, it is only taught formally in law schools.<sup>39</sup>

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<sup>38</sup> § 1973: Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f) (2) [42 USCS § 1973b(f) (2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. 1973.

<sup>39</sup> See generally, KENNEDY, *supra* note 28.

From a textual perspective, the United States Constitution represents the embodiment of our rule of law. It gives legal meaning to our geo-political commitment to a democratic market economy. The Federal Constitution has been further amended in order to give legal meaning to new social and economic circumstances. For instance, the Fifteenth Amendment became part of the Federal Constitution in 1870 in order to render illegal the exercise of property rights over human beings and avoid further social disruption. The history of the latter half of the 19<sup>th</sup> century was briefly summarized and legally translated into two constitutional amendments, including the Fifteenth Amendment, whose two paragraphs read as follows:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

The Congress shall have power to enforce this article by appropriate legislation.

This Constitutional language is confined within the dual political commitment to a market democracy, by describing the democratic need to vote. While still abstract and impersonal, the language of this amendment also uses some specific descriptors such as “on account of race, color, or previous condition of servitude,” in an attempt to make it both inclusive and contemporarily relevant within the perimeters of the liberal political theory of that time. Reality proved that “[d]espite the clear wording of the Fifteenth Amendment,”<sup>40</sup> it remained easily avoided in practice, as African Americans remained effectively disenfranchised. Both Congress and the U.S. Supreme Court refused to do anything in a game of “After you, my dear Alphonse,” which seemed “amusing to everybody, except the Negro.”<sup>41</sup> It took a century to attempt to apply it to the practice of everyday life of the former Confederacy, through statutory provisions and the subsequent cases interpreting them.

This highly structured legal system has a somehow equally well structured cognitive counterpart. Americans are reasonably well aware of the Federal Constitution, its Bill of Rights, and some of the subsequent Amendments. This could be the result of the fact that our entire culture is suffused with our Constitutional principles, with the embodiment of our rule of law. Also, it could be caused by the fact that the Constitutional text is brief and vague, almost religious,<sup>42</sup> which makes it easy to grasp and comprehend. Whether because of its simplicity or its short length, when one retains the gist of an article, the gist often coincides with the entire text. Indeed, as many observed already, legal knowledge is most inexact when it comes to detailed statutes.<sup>43</sup> However, no one has been able to generalize from there and summarize that legal confusion becomes the product of detailed textualization. The more detailed and arid the text of the law, the more sense it makes to incorporate pre-existent cultural knowledge in the process of reading it, if only to make it more useful, that is, to have a scope that seems useful in more

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<sup>40</sup> CHARLES L. ZELDEN, *THE SUPREME COURT AND ELECTIONS: INTO THE POLITICAL THICKET* 11 (2010).

<sup>41</sup> RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 142 (2004).

<sup>42</sup> See Kennedy, *supra* note 35.

<sup>43</sup> See HART, *supra* note 9.

than one minor instance. Even more likely is that one will avoid the official text altogether and read some apocryphal, inexact, but more clear and comprehensible textual version, which is also more easily accessible technologically. Think only about the ease of access by performing a Google search for “section 5 voting rights” whose first hit is a governmental web site belonging to the Department of Justice, which starts by editing the statutory language and then by offering a section called “voting news.”<sup>44</sup>

What constitutes a clear apocryphal version varies. For instance, in the 19<sup>th</sup> century, cultural manifestations of constitutional amendments included newspaper editorials, comments, and articles, as well as speeches and letters by political celebrities of the day. There is no evidence that *The New York Times* reproduced and published the text of the Fifteenth Amendment until every citizen could recite it. But there is proof that *The Times* published many reactions to this legal text. On April 11, 1870, for instance, it published an emotional, poetic, metaphor-laden letter Frederick Douglass wrote earlier on April 5, which had the advantage of summarizing the gist of the Amendment upon which Americans and, for the first time, African-Americans could and should vote:

The revolution wrought in our condition by the Fifteenth Amendment of the Constitution of the United States, is almost startling, even to me. I view it with something like amazement. It is truly vast and wonderful, and when we think through what labors, tears, treasures and precious blood it has come, we may well contemplate it with solemn joy. Henceforth, we live in a new world, breath a new atmosphere, have a new earth beneath and a new sky above us. Our new condition brings with it that which should make us thoughtful as well as joyful. It sweeps the future of our ancient shortcomings, and flings us as a race upon our own responsibility. Equal before the Lord, equal in the ballot-box and in the jury-box, the glory or shame of our future condition is to lie upon ourselves<sup>45</sup>.

Interestingly, despite its clear meaning,<sup>46</sup> there is a huge gap between the text of the Fifteenth Amendment and its application in the former Confederate states.<sup>47</sup> The difference of interpretation could be seen as the result of the divergent cultural values between the North and the South as well as between the white and black communities of the former Confederate states. The cultural convergence element, briefly explained earlier, requires a long period of time in which cultural values are able to become common and voluntarily absorbed, promoted and thus obeyed. As shown here, it took a century to start the cultural dialogue of their moral importance and incorporate them into a detailed legal text.<sup>48</sup>

Within the structure of our legal system, the gap between the wording of the Fifteenth Amendment and its application was solved in the same textual manner as the earlier Constitutional gap between the ideas of a market democracy and of human beings as the object of property: through more legal text. Suffice it to mention that before the adoption of the Fifteenth Amendment, judges readily applied

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<sup>44</sup> *Voting*, JUSTICE.GOV, [www.justice.gov/crt/about/vot/](http://www.justice.gov/crt/about/vot/) (result obtained Apr. 12, 2014).

<sup>45</sup> Frederick Douglass, *Frederick Douglass on the Fifteenth Amendment*, N.Y. TIMES, Apr. 11, 1870 at 1.

<sup>46</sup> ZELDEN, *supra* note 40.

<sup>47</sup> *Id.* at 11-35.

<sup>48</sup> See now 42 U.S.C. 1973 (originally Pub. L. 89-110, title I, § 2, Aug. 6, 1965).



the positive law known as the Fugitive Slave Acts of 1793 and 1850,<sup>49</sup> which stipulated federal involvement in slave-catching in Northern states, while expressing moral qualms about the evil nature of slavery.<sup>50</sup> One infamous instance is *Prigg v. Pennsylvania*,<sup>51</sup> where Justice Story held that the federal Fugitive Slave Act precluded a Pennsylvania state law that prohibited blacks from being taken out of Pennsylvania into slavery, and overturned the conviction of Edward Prigg – a slave catcher who kidnapped the black woman Margaret Morgan to bring her back into slavery – as a result. Even more dramatically, the Supreme Court reached its decision in *Dredd Scott v. Sandford*,<sup>52</sup> by holding that slaves were not citizens within the meaning of the Constitution and therefore were not entitled to the rights that belong to citizens,<sup>53</sup> to only reverse itself years later, in the *Slaughter-House Cases*,<sup>54</sup> on the same constitutional grounds – fortunately much changed since 1842.

In 1965, following the principles of our rule of law and in the wake of the deadly events at the Edmund Pettus Bridge in Selma, Alabama, the federal Congress finally passed specific legislation which applied both legal theory and prudence to rectify the wrongs created by our American slavery past.<sup>55</sup> With that specific act of legislation, the datable act of 1965, Congress hoped that there would be no further dilemmas in understanding and applying the right to vote laws. If the Fifteenth Amendment gave voice to democratic political principles, the Voting Rights Act of 1965 applied those principles. The language of the Act incorporated the political wisdom of the day, political reasoning or prudence,<sup>56</sup> and applied it to the reality of the American South.<sup>57</sup> Each subsequent amendment and case law interpretation meant a new application of those hard-won moral and democratic principles to a particular historical moment, which created their own approximate and imperfect cognitive dissonance between the text of the law and its actuation.

The Voting Rights Act 1965 specifically and permanently outlawed:

election procedures denying or abridging the “right of any citizen of the U.S. to vote on account of race or color;”

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<sup>49</sup> Act of February 12, 1793, 1 Stat. 302 (1793) (providing for removal of alleged slaves “upon proof to the satisfaction of such [federal] judge or [state] magistrates”); Act of September 18, 1850, 9 Stat. 462 (1850) (expanding federal involvement in capture of fugitive slaves, including providing for appointment of special federal commissioners to hear fugitive rendition proceedings and issue certificates of removal; also establishing penalties for interfering with capture of runaways).

<sup>50</sup> For an in-depth discussion about the morality of upholding the Fugitive Slave Act, *see, e.g.*, ROBERT M. COVER, *JUSTICE ACCUSED* (1975) and Ronald Dworkin, *The Law of the Slave-Catchers* (Book Review), *TIMES LITERARY SUPPLEMENT*, Dec. 5, 1975, at 1437.

<sup>51</sup> *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

<sup>52</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>53</sup> J. Randy Sawyer, *The Last Line of Defense: A Comparative Analysis of United States Supreme Court and New Jersey Supreme Court Approaches to Racial Bias in the Imposition of the Death Penalty*, 7 *SETON HALL CONST. L.J.* 663, 721 (1997).

<sup>54</sup> 83 U.S. 36, 73, 21 L. Ed. 394 (1872).

<sup>55</sup> For more details, *see generally*, ZELDEN, *supra* note 40.

<sup>56</sup> *See supra* notes 32 et seq. and accompanying text.

<sup>57</sup> ZELDEN, *supra* note 40, at 36, 50.



literacy and moral requirements and other such test or device that denied or abridged voting rights of racial minorities.

In addition, the Act contained some temporary provisions which needed periodical Congressional intervention in the form of extensions. Among them, Section 5 requires “preclearance of all changes in voting laws or procedures in certain states and political subdivisions.”<sup>58</sup> Since then, Section 5 has been renewed four times, most recently in 2006. Its latest renewal, like the preceding one, is supposed to last 25 years and, like its preceding extension, is already heavily litigated, as well as, apparently, manipulated,<sup>59</sup> and caricatured.<sup>60</sup>

Though exceedingly detailed, Section 5 remains a harbinger of ambiguity as it continues its course through the judiciary system. Some of its preceding extensions, for example, caused the United States Supreme Court Justices to “make up” statutory language under the guise of interpreting and “applying” the statute.<sup>61</sup> Some may argue that it sounds worse than it is.<sup>62</sup> Moreover, just last year, for instance, the Department of Justice invoked Section 5 to stop Republican-backed voter-identification laws in Texas and South Carolina from going into effect. But was it the spirit or the letter of the law DOJ invoked? Does it make any difference if the DOJ invoked the gist of the law? If we look at the issues raised in *Shelby County v. Holder*,<sup>63</sup> during oral argument<sup>64</sup> one is at a loss to answer these questions. Furthermore, while this case was pending, most of us followed its course through blogs or even comedians’ monologues<sup>65</sup> or online news outlets.<sup>66</sup> All these outlets, official or not, are easily accessible through the Internet, but only the apocryphal ones are easy to understand perhaps because the language they use is more culturally relevant to the reader than the arid canonic text of the law.

The litigation raised by the application of Section 5 of the 1965 Act demonstrates that legal approximation persists irrespective of the level of detail of the legal text. Through the decades following its passage, the language of the Voting Rights Act has been approximated and guessed, and misquoted by all courts including the Supreme Court of the land,<sup>67</sup> which indicates that our understanding or the Act is imperfect, and neither lay subjects nor legal professionals can agree

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<sup>58</sup> Daniel McCool, *Meaningful Votes*, in *THE MOST FUNDAMENTAL RIGHT: CONTRASTING PERSPECTIVES ON THE VOTING RIGHTS ACT 3-35* (Daniel McCool ed., 5th ed. 2012).

<sup>59</sup> Steven Yaccino & Lizette Alvarez, *New G.O.P. Bid to Limit Voting in Swing States*, N.Y. TIMES, Mar. 29, 2014.

<sup>60</sup> Marquel, *New G.O.P. Bid to Limit Voting Swing States. Black Districts to Vote at Local Zoos*, THEPOTHOLEVIEW.COM, Mar. 29, 2014.

<sup>61</sup> See discussion below.

<sup>62</sup> *Id.*

<sup>63</sup> *Shelby Cnty. v. Holder*, 570 U.S. \_\_\_\_ (2013)

<sup>64</sup> Available at

[http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-96.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-96.pdf).

<sup>65</sup> Bill Maher, *Maybe The Voting Rights Act Is Not Helping Minorities*, available at [http://www.realclearpolitics.com/video/2013/03/02/bill\\_maher\\_maybe\\_the\\_voting\\_rights\\_act\\_is\\_not\\_helping\\_minorities.html](http://www.realclearpolitics.com/video/2013/03/02/bill_maher_maybe_the_voting_rights_act_is_not_helping_minorities.html).

<sup>66</sup> Paul M. Barrett, *The Unintended Consequences of the Voting Rights Act*, BUSINESSWEEK.COM (Mar. 4, 2013), <http://www.businessweek.com/articles/2013-03-04/unintended-consequences-of-the-voting-rights-act>.

<sup>67</sup> See discussion below.

on anything other than a limited temporary meaning.

The following are but two examples representing Voting Rights Act cases which reached the United States Supreme Court: *Beer v. United States*,<sup>68</sup> and *Reno v. Bossier Parish School Board*.<sup>69</sup> In *Beer*, the U.S. Supreme Court held that applying Section 5, the DOJ had to determine within the preclearance context whether the proposed change would have a discriminatory effect on the minority voting rights effect defined as “retrogression.”<sup>70</sup>

By prohibiting the enforcement of a voting-procedure change until it has been demonstrated to the United States Department of Justice or to a three-judge federal court that the change does not have a discriminatory effect, Congress desired to prevent States from “undo(ing) or defeat(ing) the rights recently won” by Negroes. H.R.Rep.No.91-397, p. 8, U.S. Code Cong. & Admin. News 1970, p. 3284. Section 5 was intended “to insure that (the gains thus far achieved in minority political participation) shall not be destroyed through new (discriminatory) procedures and techniques.” S.Rep.No.94-295, p. 19, U.S. Code Cong. & Admin. News 1975, p. 785.

When it adopted a 7-year extension of the Voting Rights Act in 1975, Congress explicitly stated that “the standard (under s 5) can only be fully satisfied by determining on the basis of the facts found by the Attorney General (or the District Court) to be true whether the ability of minority groups to participate in the political process and to elect their choices to office is Augmented, diminished, or not affected by the change affecting voting....” H.R.Rep.No.94-196, p. 60 [...] In other words the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise (emphasis added).<sup>71</sup>

As shown above, “retrogression” is a conclusion the Justices used to define an undesired effect under Section 5. Retrogression was meant to describe the effect prohibited by Section 5, which were changes that place minority voters in a worse position than under the status quo ante.<sup>72</sup>

But using that term the Court did not rely on the statutory language. By using a term that was not part of the statutory language, the Court indicated that their legal understanding, their legal knowledge was imperfect. As Justice Thurgood Marshall noted in his dissent,<sup>73</sup> the term “retrogression” came from a passage in an extraneous document, a House Report, that the Court identified in its opinion. Legislative history, of course, is not an integral part of a statute.

In justifying its convoluted construction of § 5, however, the Court never deals with the fact that, by its plain language, § 5 does no more than adopt, or arguably

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<sup>68</sup> *Beer v. United States*, 425 U.S. 130 (1976).

<sup>69</sup> *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000).

<sup>70</sup> *Beer*, 425 U.S. at 141.

<sup>71</sup> *Id.* at 140-41.

<sup>72</sup> Peyton McCrary, *The Constitutional Foundations of the “Preclearance” Process: How Section 5 of the Voting Rights Act Was Enforced, 1965-2005* in McCool ed., *supra* note 58, at 44-45.

<sup>73</sup> *Beer*, 425 U.S. at 146.

expand,<sup>74</sup> the constitutional standard. Since it has never been held, or even suggested, that the constitutional standard requires an inquiry into whether a redistricting plan is “ameliorative” or “retrogressive,” A fortiori there is no basis for so reading § 5. While the Court attempts to provide a basis by relying on the asserted purpose of § 5 to preserve present Negro voting strength ... it is wholly unsuccessful. What superficial credibility the argument musters is achieved by ignoring not only the statutory language, but also at least three other purposes behind § 5.<sup>74</sup>

*Reno v. Bossier Parish School Board*,<sup>75</sup> rather than rectifying the earlier approximate legal meaning, incorporated it. Rather than focus on the statutory language of Section 5, its canonic language, the Court again ignored it. This seems a clear indication that legal knowledge cannot emanate solely from the official text of the law, and fictional tools, such as “stare decisis” are best suited to ensure its normative function of promoting the rule of law. Justice Scalia, who wrote the majority opinion in *Bossier*, and who, ironically, is probably the Court’s most committed opponent of the relevance of statutory history,<sup>76</sup> incorporated the previous Court construct of “retrogression” in *Bossier*’s statutory application of Section 5, and further diluted the statutory knowledge by expanding this term of art to define the statutory “purpose” as well as its “effect.”<sup>77</sup>

These examples demonstrate that statutes, which are detailed applications of our rule of law, embodied by our Constitution, cannot and do not generate exact legal knowledge. To the contrary, their descriptive, arid content encourages approximate knowledge which needs to be supplemented with other sources in addition to the statutory language itself. This reality reminds one of Hart’s observations that legal differences are inherent and jurists use specific tools to ensure legal coherence viewed as necessary for law’s normativity.<sup>78</sup> *Stare decisis* works as a corrective tool.

Justice Benjamin Cardozo quoting William Galbraith Miller’s *The Data of Jurisprudence*<sup>79</sup> described the importance of *stare decisis* more than a century ago, in this way:

If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was a defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights.<sup>80</sup>

Cardozo’s Sisyphus-type of hunt for consistency in the face of approximate legal knowledge and ambiguity is perhaps best matched by that of Justice Antonin

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<sup>74</sup> *Beer v. United States*, 425 U.S. 130, 149-50 (1976).

<sup>75</sup> *Reno v. Bossier Parish Sch. Bd*, 528 U.S. 320 (2000).

<sup>76</sup> More on Scalia’s inconsistent statutory interpretation, see, e.g., *Ransom v. FIA Card Services, N.A.* 131 S.Ct. 716, 731 et seq. (2011) (Scalia’s dissent); also, Mark Tushnet, *Theory and Practice in Statutory Interpretation*, 43 TEX. TECH L. REV. 1185 (2011).

<sup>77</sup> *Bossier*, 528 U.S. at 341.

<sup>78</sup> See HART, *supra* note 9.

<sup>79</sup> WILLIAM GALBRAITH MILLER, *THE DATA OF JURISPRUDENCE* (1903).

<sup>80</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 33-34 (1921).

Scalia, whose attempts to ensure consistency are remarkable:

[O]ne of the most substantial... competing values [in adjudication], which often contradicts the search for perfection, is the appearance of equal treatment. As a motivating force of the human spirit, that value cannot be overestimated.<sup>81</sup>

More philosophically than factually possible, Justice Scalia professes to use statutory language to a fault.<sup>82</sup> In practice, though, he uses whatever tools fit the decision he has in mind – in our Voting Rights Act example, Scalia used legislative history ignoring the statutory language.<sup>83</sup>

Others are more honest and realize that professing one thing and doing another does not change reality. For instance, scholars have noted the unreliable character of *stare decisis* since 1930, when Jerome Frank published his findings that a court could decide one way or the opposite and make its reasoning appear equally flawless.<sup>84</sup> The Critical Legal Studies movement founded itself upon a similar point.<sup>85</sup>

If legal knowledge is inherently imperfect because of its highly hierarchical structure which encourages retention of the main constitutional principles (the rule of law translating our market-driven democracy) and approximation of the descriptive applications of our rule of law, we also saw that its linguistic nature also plays a role in this legal ambiguity. To continue our investigation then the next step should be an introspective analysis of our legal education.

#### IV. HAVE HEAVILY EDITED CASEBOOKS INTRODUCED THE TASTE FOR THE APOCRYPHAL AND PARTIAL

American law schools are renowned for their Socratic method which makes students learn as they espouse their ignorance. The birth of this method dates back to 1870, the year when Christopher Columbus Langdell became Harvard's Dane Professor:

The day came for its first trial. The class gathered in the old amphitheater of Dane Hall – the one lecture room of the School – and opened their strange new pamphlets, reports bereft of their only useful part, the head-notes! The lecturer opened his.

“Mr Fox, will you state the facts in the case of *Payne v. Cave*?”

Mr. Fox did his best with the facts of the case.

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<sup>81</sup> Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV., 1175, 1178 (1989).

<sup>82</sup> Antonin Scalia, *Common-law Courts in a Civil-Law System: The Role of United States Federal Court in Interpreting the Constitutions and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 31 (1997).

<sup>83</sup> William D. Popkin, *An Internal Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV., 1133, 1143 (1992).

<sup>84</sup> JEROME FRANK, *LAW AND THE MODERN MIND* 72 (1930).

<sup>85</sup> See, e.g., UNGER, *supra* note 22; Michael H. Davis, *Death of a Salesman's Doctrine: A Critical Look at Trademark Use*, 19 GA. L. REV. 233, 279 (1985); Dana Neacsu, *CLS Stands for Critical Legal Studies, If Anyone Remembers*, 8 J.L. & POL'Y 415 (2000).

“Mr. Rawle, will you give the plaintiff’s argument?”

Mr Rawle gave what he could of the plaintiff’s argument.

“Mr. Adams, do you agree with that?”

And the case-system of teaching law had begun....<sup>86</sup>

From the perspective of this article, what is remarkable about Langdell’s method, as then Harvard President Eliot remarked, was his reliance on the authentic version of the law (an accurate version of a decision). Professor Langdell taught law by asking his students to go to the original sources. And indeed, *Payne v. Cave*, the case that started the Harvard educational revolution was reproduced in the case book in its entirety.<sup>87</sup> Langdell did not ask his students to approximate the law or recite definitions and rules: “When and by what statute were lands made alienable in England after the conquest?”<sup>88</sup> nor “What is the difference between an action of trespass and an action of trespass upon the case?”<sup>89</sup> Langdell believed and taught his students that learning law was possible by reading and analyzing the original sources<sup>90</sup> which were both available – printed in the case book, and available to a limited extent in the library – and understandable, thus permitting the deconstruction of the text and its reconstruction through analysis.

Langdell’s original Socratic method relied on case-books as an anthology, a collection of cases presented in their entirety to the student to read and analyze. Langdell thought using primary sources, the law itself in its original authoritative form, would teach students “what the law is.”<sup>91</sup> By analogy to chemistry, Harvard University President Eliot explained Langdell’s methodology:

[Langdell] told me that the way to study [law] was to go to the original sources. I knew it was true, for I had been brought up in the science of chemistry myself; and one of the first rules of a conscientious student of science is never to take a fact or a principle out of second hand treatises, but to go to the original [source].<sup>92</sup>

Interestingly enough, for the last century, the case law method has departed from its original meaning, as envisaged by what purports to be the Langdell method: asking the students to read and analyze cases, “the original source” of law. Now, casebooks are such a collection of heavily edited and shortened versions of

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<sup>86</sup> 2 CHARLES WARREN HISTORY OF THE HARVARD LAW SCHOOL AND EARLY LEGAL CONDITIONS IN AMERICA 372 (1908).

<sup>87</sup> *Payne v. Cave*, 3 T.R. 148, 3 Burr. 1921 (1789).

<sup>88</sup> WARREN, *supra* note 86, at 373.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 361.

<sup>91</sup> Interestingly, however, Langdell did not claim that his casebook was to facilitate case learning in the Socratic model. In his first casebook, available in the Harvard Law Library, he says simply that he was making the casebook available because there were not enough copies of the cases in the library collection.

<sup>92</sup> *Id.* at 361.

cases<sup>93</sup> that their purpose cannot be Langdell's-- teaching students "to never take a fact or a principle out of second hand treatises, but to go to the original [document for] that fact or principle."<sup>94</sup> Under the guise of adherence to Langdell's principle that law is science, casebooks are currently serving the students a goulash of definitions and rules, and contextual information, in other words secondary sources. Ironically, this is what Langdell wanted to end, because something like this pot-pourri method is what law students were taught in the pre-Langdell years.

Today, such shorthand study of the law mirrors, perhaps unintentionally, a technological culture, which panders to the limited attention span inculcated and fostered by the advent of MTV, videogames and social media interactions. Could it be possible that this legal ersatz chips away at our professional reverence for the original source of the law, and as professionals we are getting ready to treat a WIKIPEDIA version of the law in the same manner that Langdell's conscientious law student read the original text --albeit reproduced in a case book under the supervision of a law student -- the research assistant -- and of his law professor?

## V. HOW THE DISTRIBUTION OF LEGAL KNOWLEDGE AND OUR USE OF TECHNOLOGY ENCOURAGE RELIANCE ON APOCRYPHAL TEXTS

Perhaps the way professionals are taught encourages a shift of their reliance. Perhaps technology has a role in that too, and it causes both professionals and lay citizens to confuse or ignore differences between the original and the apocryphal version of the law.

In this section we will focus on one factor that we believe continues to make legal knowledge ambiguous for the lay person: the distribution of legal information and how we interact with it and perform legal research in a way that further contributes to the dilution of legal knowledge. Technology intermediates any textual reading, and this paper argues, favors a legal reading of the more widely accessible though not necessarily official texts.

Our society is governed by the "rule of law" which engenders a specific type of legal system with specific legal rules which enjoy a well-established set of characteristics. As Roberto M. Unger explained, to become binding and enforceable rules, the laws of any liberal state, need to be "general, uniform, public, and capable of coercive enforcement."<sup>95</sup> But what does it mean to be public today in our culture suffused by legal vernacular? Do we need to access the canonic, official, legal texts? Is it sufficient to read a WIKIPEDIA summary? If commercial entities can publish official versions of governmental law, can a WIKIPEDIA summary replace them all? Furthermore, as this paper suggests, if our legal knowledge is by its nature approximate, what is the value of the canonic text? It seems that we

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<sup>93</sup> E. Allan Farnsworth, *Casebooks and Scholarship: Confessions of an American Opinion Clipper*, 42 Sw. L.J. 903, 909 (1988) (collections of cases easy to digest by students); Matthew Bodie, *The Future of the Casebook: An Argument for an Open-Source Approach*, 57 J. LEGAL EDUC. 10, 14 (2007) (casebooks collages of cases); Anne M. Corbin & Steven B. Dow, *Breaking the Cycle: Scientific Discourse in Legal Education*, 26 TEMP. J. SCI. TECH & ENVTL. L. 191 (2007) (casebooks collections of heavily edited and summarized cases; empirical data about the percentage of dicta casebooks reproduce).

<sup>94</sup> 2 CHARLES WARREN HISTORY OF THE HARVARD LAW SCHOOL AND EARLY LEGAL CONDITIONS IN AMERICA. 361 (1908).

<sup>95</sup> UNGER, *supra* note 7, at 73.



ignore it either because it is dense or because to apply it both jurists and lay people need to understand it and their understanding relies on cultural manifestations of the rule of law.

Our “rule of law” requires its legal norms to be public, as Unger makes clear. This mandate was established by the Articles of Confederation. Article I, §5, cl. 3 of the U.S. Constitution requires the same: “Each House shall keep a Journal of its Proceedings, and from time to time publish the same...” Article IV, §1 also adds that all legal norms be published and authenticated:

Full faith and credit shall be given in each state to *the public acts, records, and judicial proceedings of every other state*. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.<sup>96</sup>

However, publicity has a historical reality and it may mean different things depending on the technology available at a specific point in time. For instance, since 1813, the government became responsible for distributing legal information to specific institutions, libraries. The *Resolution for the Printing and Distribution of an Additional Number of the Journals of Congress, and of the Documents Published Under Their Order*,<sup>97</sup> was subsequently amended and it became the *Act Providing for Keeping and Distributing All Public Documents*.<sup>98</sup> A year later the Government Printing Office was created, charged with “packing, distributing, collecting, arranging, classifying, and preserving such documents.”<sup>99</sup>

Until very recently, technology reduced this conversation to print. The GPO’s publications were: one collection of print statutes, the Statutes at Large and their codified version, *the United States Code*, one set of cases from the United States Supreme Court, the United States Reports, ominously abbreviated U.S., and the rules issued by federal agencies, again in two formats, sequentially –the Federal Register - and topically – the Code of Federal Regulations. With few exceptions, such as New York’s statutory compilations privately published by Thomson/West and Elsevier/Lexis, state governments were responsible for making sure that, as Kafka suggested, and Bentham demanded, law remains accessible at all times to everyone.<sup>100</sup>

Where the government does not print the information there is no official legal text for the specific set of legal norms. New York, for instance, has no official statutory compilations, as all statutory print publications belong to the duopoly – West and Lexis. Professionally, one may argue, there is a preference for the West product, as the national guide to uniform legal citations, *The Bluebook*, positions the West publication, *McKinney’s Consolidated Laws of New York Annotated* ahead of the Lexis/Nexis product, *New York Consolidated Law Service*.<sup>101</sup> *The*

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<sup>96</sup> U.S. CONST.. art. IV, §1 (emphasis added).

<sup>97</sup> J. Res. 1, 13th Cong., 3 Stat. 140 (1813).

<sup>98</sup> Ch. 22, § 1, 11 Stat. 379, 379 (1859).

<sup>99</sup> *Id.*

<sup>100</sup> For more on the history of accessing legislation, see, e.g., Shannon E. Martin & Gerry Lanosga, *The Historical and Legal Underpinnings of Access to Public Documents*, 102 LAW LIBR. J., 613 (2010).

<sup>101</sup> THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 255 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).

*Bluebook* itself, however, specifically says “Cite to one of the following sources, if therein.”<sup>102</sup> However, as a practical matter, English reads from top to bottom, and McKinney’s position as first listed further encourages its use by those following *The Bluebook*. In other words, while there is no official source,<sup>103</sup> the preferred sources are the financially highly prohibitive sources published by West and Lexis, making legal information the fiefdom of a legal duopoly.<sup>104</sup>

The advent of digitization did cause some extravagant results in the distribution of legal information. Within certain limits which have suddenly become both more obvious and insurmountable, the federal government has improved its digital presence and made legal research possible for free using the official digital repositories of statutes and administrative law.<sup>105</sup> At the federal level, the search engine of the official web site, FDSys<sup>106</sup> continues to amass more and more statutory and administrative information, but its access remains cumbersome. Moreover, when it comes to case law, in addition to the overwhelming process of locating cases, updating their status is a money proposition dictated by the older behemoths Westlaw and Lexis, and their younger contender, the seemingly more affordable Bloomberg which charges a fraction of the price of the others.<sup>107</sup> At the state level, the legal research problems are so intractable that despite the fact that we could talk about New York officially published statutes for the first time, - ny.gov – open legislation – the questions of currency and authentication,<sup>108</sup> for instance, remain unanswered, unknown, and unknowable.

Thus, while digitization made the government’s work of publishing its laws much less difficult, the government – federal and state- chose to outsource this fundamental job of providing the official text of its laws, by contracting with commercial entities or making it easier for corporations to cannibalize its responsibilities – see the New York situation – and generate, collect, store, and retrieve the official version of our legal information, such as statutes and cases and then make legal knowledge a matter of who has enough money to pay for it. Perhaps the most outrageous legal dissemination is related to federal case law, which has hitherto

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<sup>102</sup> *Id.* at 215.

<sup>103</sup> KENDALL SVENGALIS, LEGAL INFORMATION BUYER’S GUIDE AND REFERENCE MANUAL 651 (2012).

<sup>104</sup> See generally, David Hall, *Google, Westlaw, LexisNexis and Open Access: How the Demand for Free Legal Research Will Change the Legal Profession*, 26 SYRACUSE SCI & TECH L. REP., 53 (2012).

<sup>105</sup> LEGAL RESEARCH WIKI, <http://legalresearch.wikischolars.columbia.edu/> (last visited Aug. 5, 2014).

<sup>106</sup> FDSYS, <http://www.gpo.gov/fdsys/> (last visited Aug. 5, 2014).

<sup>107</sup> There are less costly alternatives of these databases, some offered by each state Bar Association to their members. FastCase is such an alternative. CaseText.com is the new kid on the block still working to create a free-of-charge case law database with a crowd sourcing citatory.

<sup>108</sup> For more information on authentication, see, e.g., <http://community.aallnet.org/digitalaccessstolegalinformationcommittee/stateonlinelegalinformation>  
<http://govinfo.sla.org/2011/07/28/authentication-digital-law-report-from-aall/>  
<http://www.cga.ct.gov/2010/rpt/2010-R-0511.htm> <http://blog.law.cornell.edu/voxpath/tag/authentication-of-electronic-legal-information/> (last visited Aug. 5, 2014).

been the unchallenged print fiefdom of West. The 2002 E-Government Act<sup>109</sup> encouraged federal courts to post their decisions on-line, but this is not necessarily going to facilitate legal research; legal research is not something tantamount to finding one's name in the phone book: you do not tend to locate it by the court and parties' names.

First, PACER, the federal courts' system for electronic access to records, has recently celebrated a quarter century.<sup>110</sup> That milestone happened to coincide with the troubled launch of the Healthcare.gov website. In sharp contrast, the venerable Public Access to Court Electronic Records is a government site that with the caveat presented below, has been remarkably stable and successful.

PACER does contain hundreds of millions of digitized court documents, dockets, memos, opinions, etc., but it is cumbersome and crotchety to use, often cryptic in its naming and coding, and archaic in its document handling, so it is more an access-teaser than an access point to information. Part of PACER's problem is that it is actually 214 separate systems. Every appellate, district and bankruptcy court maintains its own site, each requiring a separate search. The site's partial solution to this dispersion is the Case Locator, an index for searching case information across the PACER system. But the Case Locator is updated only once daily, collects only subsets of data from court sites, and has limited functionality. What PACER needs is a whole new interface—one that provides universal search, more robust search tools, more informative search results, and better ways to manage documents and downloads.

It turns out that such an interface already exists. It comes from PacerPro, a service started by Gavin McGrane, a San Francisco lawyer who became frustrated with PACER's shortcomings and wanted an easier way to use it. Even better, PacerPro is now free. It launched in November 2012 as a subscription service at \$25 a month. But in January it eliminated the subscription fee. "We decided to allow people to get a chance to know us and see how good the product is," McGrane said ominously, implying a future plan to revert to a pay-to-play service.<sup>111</sup>

Second, the text of the United States laws has become a profitable commodity. To the extent that corporations own the monopoly over information and the copyright over the pagination of that information,<sup>112</sup> they "dictate the movement

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<sup>109</sup> Pub.L. 107-347, 116 Stat. 2899, 44 U.S.C. § 101 (2012).

<sup>110</sup> Robert Ambrogi, *Service Offers a Better Way to Search Federal Court Records Than PACER*, ABA JOURNAL (Mar. 1, 2014, 2:30 AM)

[http://www.abajournal.com/magazine/article/service\\_offers\\_a\\_better\\_way\\_to\\_search\\_federal\\_court\\_records\\_than\\_pacer/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=tech\\_monthly](http://www.abajournal.com/magazine/article/service_offers_a_better_way_to_search_federal_court_records_than_pacer/?utm_source=maestro&utm_medium=email&utm_campaign=tech_monthly).

<sup>111</sup> *Id.*

<sup>112</sup> It is not absolutely clear yet that mere pagination is any different than the alphabetization found uncopyrightable in *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991), which thus limits West's 1986 triumph over Mead Data Central, Lexis's parent company, in the Eighth Circuit, which held that West had a copyright interest in the paginated arrangement of the cases in its National Reporter System (*West Publ'g Co. v. Mead Data Cent. Inc.*, 799 F.2d 1219, 1241) (8th Cir. 1986)). For more, see, e.g., Olufunmilayo B. Arewa, *Open Access in A Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market*, 10 LEWIS & CLARK L. REV. 797, 839 (2006). William R. Mills, *The*

and use of that information, which is very profitable.”<sup>113</sup>

The few free sources of legal information are trying to reproduce the official information, for example Cornell’s LII<sup>114</sup> while others editorialize that information, (see WIKIPEDIA), and even others create guides about how to navigate the free sources of legal information and to learn to what extent you can rely on them.<sup>115</sup> WIKIPEDIA summaries are by far the best known and the most influential in production of legal knowledge. They come at the top of any list generated by a Google search. Furthermore, the language the WIKIPEDIA editors use is devoid of legalese and other trade-imposed jargon, endearing it to readers as user-friendly. While professionals may be skeptical of calling this true legal knowledge, it is only from the point of the Hartian that only what judges see must be termed legal. From the point of what is “public,” it is clear that WIKIPEDIA probably wins that contest hands-down.

If the majority of the public relies on WIKIPEDIA summaries, then what can be said about the legal knowledge of legal professionals? Their research patterns simulate the lay person’s search patterns because Google searches and WIKIPEDIA summaries are ingrained in our searches – to the extent we use the Internet, of course.<sup>116</sup> Additionally, all legal research, if topical, starts with a commentary or analysis which is labeled as “secondary sources.” Yale’s Morris Cohen said it many times: “Secondary sources are usually more straightforward and try to explain the law.”<sup>117</sup> Their language is the one that students of the law will remember when they read a statute or case. Of course, the student and jurist will ultimately cite to the official text of the law, but its use is determined by that apocryphal version of the law, whether it comes from WIKIPEDIA or a professional journal, and if you take Hart seriously, the penumbra, which far outnumbers the core of any statute, will be dominated by WIKIPEDIA or similar publications of the future.

Reaching the end of this paper, it seems ominously possible that we could live in a WIKIPEDIA world and few would know the difference. Were it not for the BLUEBOOK, which requires the citation to the official canonic text of the law, perhaps we would be already there.

A century ago, this conclusion would have been only acceptable to the likes of Walter Lippmann, a journalist who choreographed the government war propaganda efforts under the Wilson administration, partly because he mistrusted the ability of the masses to govern themselves. Lippmann believed ordinary citizens did not have the ability to gather the knowledge required by what he considered

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*Decline and Fall of the Dominant Paradigm: Trustworthiness of Case Reports in the Digital Age*, 53 N.Y.L. SCH. L. REV. 917, 926 (2009).

<sup>113</sup> Gary Wolf, *Who Owns the Law?*, WIRED, [http://www.wired.com/wired/archive/2.05/the.law\\_pr.html](http://www.wired.com/wired/archive/2.05/the.law_pr.html) (last visited Aug. 5, 2014).

<sup>114</sup> *Legal Information Institute*, CORNELL LAW SCHOOL, <http://www.law.cornell.edu/> (last visited Aug. 5, 2014).

<sup>115</sup> LEGAL RESEARCH WIKI, <http://legalresearch.wikischolars.columbia.edu/> (last visited Aug. 5, 2014).

<sup>116</sup> See generally, Dana Neacsu, *The Internet: Academic Foe or Friend- Google and Federated Searches May Point the Way Forward for Branding Law Libraries*, AALL SPECTRUM, 25-26 (2013).

<sup>117</sup> MORRIS L. COHEN & KENT C. OLSON, *LEGAL RESEARCH IN A NUTSHELL* 32 (2010).

our utopian democratic principles.<sup>118</sup> Lippmann's position was that governing was the job of the educated elites and, if his background were to be an indication of what he understood to be elites, then these were limited to Harvard graduates. In his view, the educated elites would also editorialize the news and other pieces of knowledge and coat it with a lot of cultural gossip disseminated for mass consumption through mass media. But judging by what we have discussed here, it seems that at the beginning of the twentyfirst century, our legal elites are, in addition to our U.S. Supreme Court Justices, the WIKIPEDIA editors as well as the Google engineers who write the Google algorithms promoting the WIKIPEDIA entries at the top of any Google search we perform.

## VI. CONCLUSION

This paper addressed the law's textual identity which seems to dictate legal knowledge: its depth and comprehensiveness. Furthermore, the distribution of legal information and our legal research habits, tend to have users invoke the specific and tangible statutes or cases, such as the Voting Rights Act 1965, or the U.S. Supreme Court decision in *Brown v. Board of Education*, in their official canonic version, but use their interactions with other versions of the law, commercial or not, summarizing in various cultural forms the official record. The more complicated question now becomes whether anything should be done about our canonic official legal texts, or whether we should allow the fiction regarding their cognitive legal role to continue.

Most of the time law is conceived abstractly -- in its esoteric form -- as a norm designed to dictate our behavior. However, when we talk about legal norms we invoke their grounds and sources. At that moment law becomes more than an abstract concept. At that moment we can visualize it as something technologically accessible. Its location depends on the reader's interaction with the legal technology. Jurists tend to invoke an official legal repository, such as the United States Code, and will cite the exact location of a statute, in its official, canonic version, such as 42 U.S.C. § 1983 (2012). We summon the powers associated with the official text of the law but, this essay contends, due to the nature of legal knowledge, including its language, and the distribution of legal information, which influence the way we access or research law, we use some apocryphal and widely available but not necessarily reliable version of the law-- including its WIKIPEDIA summary.

This is not a new problem, internationally, or in the United States. One of the goals of the French Revolution was to destroy the system whereby judges ruled as tyrants, applying an unknowable law in an unknowable way. The immediate result was the famous French Code Civil, which reduced dozens of treatises into a simple volume in which all of the law could be found, at least according to the intents of its authors. Around the same time Jeremy Bentham insisted that law, to be truly law, had to be knowable to the extent that it should be posted, and concise enough to be so posted, at the entrance to every train station. Big business for abstract-writers, we suppose. And, at around the same time, New York's Justice Field suggested and led a nationwide campaign to simplify the common law into a code

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<sup>118</sup> See generally, WALTER LIPPMANN, PUBLIC OPINION (1922); WALTER LIPPMANN, THE PHANTOM PUBLIC (1925).

along the French model, so to achieve Bentham's goal of codifying the entire Common Law.<sup>119</sup>

We are clearly farther from the goal than ever. And it seems the goal is receding at record pace. What does it mean for the meaning of law?

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<sup>119</sup> LORD HALSBURY quoting Bentham in his Introduction to THE LAWS OF ENGLAND (Vol. I. p, ccviii): "To render a code of laws complete [requires] taking the body of the laws in their entirety..." See C.K. Ogden, *Introduction*, xviii-xix in JEREMY BENTHAM, THE THEORY OF LEGISLATION (1931).



